

Attorney Docket No.: J6839(C)  
Serial No.: 10/730,218  
Filed: December 8, 2003  
Confirmation No.: 4638

**BRIEF FOR APPELLANT**

Sir:

This is a Brief for appellant's Appeal in response to the Notice of Panel Decision from Pre-Appeal Brief Review mailed on December 9, 2010, concerning the above-identified application.

A request for an extension of time for two (2) months to March 9, 2011, accompanies this submission.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; C.F.R. §1.136.

**BRIEF FOR APPELLANT**

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### **I. REAL PARTY IN INTEREST**

The Real Party in Interest in this Appeal is Conopco, Inc., a corporation of the State of New York, d/b/a Unilever.

### **II. RELATED APPEALS AND INTERFERENCES**

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

### **III. STATUS OF CLAIMS**

This Appeal is taken from the Final Rejection of claims 1, 3-6 and 11-16, the pending claims in the application. Claims 2, 7-8, 10 and 17 have been cancelled. Claims 18-39 are withdrawn. A copy of the appealed claims is listed in this Brief as VIII. Claims Appendix.

### **IV. STATUS OF AMENDMENTS**

No Amendments after the Final Rejection have been filed.

## **V. SUMMARY OF CLAIMED SUBJECT MATTER**

The following is a summary of the claimed subject matter as recited in the single independent claim 1 involved in the appeal; referring to the specification by page and line number and to the drawing (if any) by reference number as applicable.

Claimed is a skin care or cleansing composition (page 2, line 1), comprising:

- (a) a dispersed phase including a first component, and a second component that is different from the first, the first component being capable of chemically reacting with the second component (page 2, lines 32-33);
- (b) a continuous phase present in the composition composed of a substantially anhydrous carrier (page 2, lines 34-35);
- (c) an organophilic particle stabilizer contained in the dispersed phase (page 2, lines 36-37);
- (d) wherein the first component is substantially unsolvated in the carrier (page 3, line 5);
- (e) an anionic surfactant in a concentration of at least 2% by wt. when the organophilic particle stabilizer consists solely of waxy particles (page 3, lines 8-9); and,
- (f) wherein the first and second components do not substantially react with water or each other until dispersed or dissolved in water during cleansing or skin treatment by a user (page 7, lines 27-28; page 1, lines 2-23)

## **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

### **35 U.S.C. § 102(b)**

Claims 1, 5-6, 9 and 11-13 were rejected under 35 U.S.C. § 102(b) as anticipated by Farrell, et al., (US 6,063,390), issued May 16, 2000, as evidenced by ChemBrief (Optigel SH synthetic Silicate, June 2003, Vol. 3, Iss. 2).

### **35 USC § 103(a)**

Claims 1, 3-6, 9, 11-14 and 16 were rejected under 35 U.S.C. 103(a) as being unpatentable over Farrell, et al., (US 6,063,390), issued May 16, 2000, as evidenced by ChemBrief (Optigel SH Synthetic Silicate, June 2003, Vol. 3, Iss. 2).

Claim 15 was rejected under 35 U.S.C. 103(a) as being unpatentable over Farrell, et al., (US 6,063,390), issued May 16, 2000, as evidenced by ChemBrief (Optigel SH Synthetic Silicate, June 2003, Vol. 3, Iss. 2) as applied to claims 1, 3-6, 9, 11-14 and 16 above, and further in view of Sun, et al. (US 2004/0062735) published April 1, 2004.

## **VII. ARGUMENT**

### **35 U.S.C. § 102(b)**

The examiner's rejection of claims 1, 5-6, 9 and 11-13 under 35 U.S.C. § 102(b) as anticipated by Farrell, et al., (US 6,063,390), issued May 16, 2000, as evidenced by ChemBrief (Optigel SH synthetic Silicate, June 2003, Vol. 3, Iss. 2) should be reversed.

The examiner asserts that Farrell, et al., teach an effervescent cleansing composition which comprises a mixture of an acid material such as citric acid and an alkaline material such as sodium bicarbonate (abstract). Water contact causes the combination to effervesce (abstract). The alkaline material is a substance which can generate a gas such as carbon dioxide when contacted with water and the acidic material (column 2, lines 19-23). In one embodiment, Farrell, et al., teach a composition comprising potassium bicarbonate, lactic acid (satisfying claim 1a, 1b, 1d and 1f), sodium sulfosuccinate present at 11.6% by weight (satisfying claim 1e) and Optigel SH (sodium magnesium silicate) (satisfying claim 1c and e) (Table IV).

In response, applicants respectfully assert that a proper prima facie case is not set forth because Farrell, et al., and ChemBrief fail to disclose or suggest at least the following independent elements:

- 1 (b). a continuous phase present in the composition composed of a substantially anhydrous carrier; and
- 1 (c). an organophilic particle stabilizer contained in the dispersed phase;

Farrell discloses a simple powder blend of reactive components in intimate contact in a substantially anhydrous condition which is different from the claimed continuous phase containing a dispersed phase. The skilled person would understand that a continuous phase is a liquid part of a disperse system that also contains a dispersed phase. The dispersed phase could be either a liquid or a solid (see McGraw Hill Dictionary definition of record). This is also exemplified in the examples in the instant specification (see tables 1-9 regarding the elected invention). The examiner also objects to applicant's characterization of the term "continuous phase" as a liquid citing the definition of "phase" in Hawley's Condensed Chemical Dictionary (1971). In response, applicants respectfully reiterate that the definition of "phase" used by the examiner is overbroad as would be evident to the person of ordinary skill in the art ("POSITA") since it is not modified by the term "continuous". The complete phrase "continuous phase" would be understood by the POSITA as a liquid consistent with the McGraw-Hill Scientific Dictionary definition (of record). Applicants respectfully submit that this definition should be considered by the examiner as the broadest reasonable interpretation "In light of the specification as it would be interpreted by one of ordinary skill in the art". In re Am. Acad. of Sci. Tech. Ctr., 367 F.3d 1359, 1364 (Fed. Cir. 2004). See also MPEP 2111. Furthermore, the applicants respectfully submit that prior art stabilizers such as sodium magnesium silicate or as evidenced by ChemBrief (Optigel SH Synthetic Silicate, June

2003, Vol. 3, Iss.2) fail to anticipate claim limitation 1(c) because such silicate component doesn't meet the limitation of "organophilic particle" as would be evident to the POSITA. Silicate compounds are known by the POSITA to be attracted to or solvated by polar materials or solvents such as water in contrast to organophilic particles which are attracted to or solvated by nonpolar materials/solvents (see [mediLexicon.com](http://mediLexicon.com) dictionary definitions of record of organophilic and organophilicity). Nonlimiting examples of inventive organophilic particles are described in the instant specification on page 20, lines 12-17 and include e.g., organophobically modified clays.

The examiner further asserts that ChemBrief teaches sodium magnesium silicate is similar to "Bentone" (Bentonite). Upon careful review of the ChemBrief article, applicants find the phrase "The chemical composition of the synthetic material (Optigel® SH Synthetic Silicate) is similar to Bentonite, Montmorillonites, etc., but Synthetic Silicate does not have heavy metals implanted in the layer lattice ... " Applicants respectfully submit the examiner errs by equating this statement regarding the similarity of such clays with the claimed "organophilic particle stabilizer" for the following reasons.

Applicants expressly teach organophilic particles may include organically modified clays and that such modified clays may be made by reacting e.g., Bentonite with fatty quaternary compounds (see instant specification page 7, lines 18-22). Therefore, even if the skilled person was lead to Bentonite from the ChemBrief reference (which applicants do not concede) there would still be no teaching or suggestion to use an organically modified Bentonite or other organically modified clay. Moreover, the POSITA understands that clays such as Bentonite are complex calcium aluminum magnesium silicate hydroxides that are naturally hydrophilic and not hydrophobic.

Applicants further respectfully submit that neither the small size of platelets nor the ability to form lamellar phase are relevant to organophilicity as the examiner asserts. As discussed above, applicants have been unable to find any reference to organophilicity in the ChemBrief reference which is required by the instant claims. The examiner also provides no reason why a POSITA would consider the silicates or similar clays described in the ChemBrief article to have organophilic character. Therefore, applicants respectfully reiterate that the ChemBrief article fails to remedy the deficiencies of Farrell, et al., with respect to setting forth prima facie case under §§ 102(b) and 103(a) for claims 1-6, 9, 11-15, 17-20 and 23.

Applicant's respectfully submit that assuming arguendo a proper prima facie case had been set out the unexpected results disclosed in the examples is sufficient to rebut the examiner's rejection under §103. KSR v. Teleflex, 127 S. Ct. 1727 (2007). MPEP 716.02(a). When a person of ordinary skill is faced with "a finite number of identified, predictable solutions" discovery "is likely the product not of innovation but of ordinary skill and common sense." KSR, 127 S. Ct. at 1742. In other cases, though, researchers can only "vary all parameters or try each of numerous possible choices until one possibly arrive[s] at a successful result, when the prior art [gives] either no indication of which parameters [are] critical or no direction as to which of many possible choices is likely to be successful." In re O'Farrell, 853 F.2d 894, 903 (Fed. Cir. 1988). In such cases, "courts should not succumb to hindsight claims of obviousness." In re Kubin, 561 F.3d 1351 (Fed. Cir. 2009). Similarly, patents are not barred just because it was obvious "to explore a new technology or general approach that seemed to be a promising field of experimentation, where the prior art gave only general guidance as to the particular form of the claimed invention or how to achieve it." In re O'Farrell, 853 F.2d at 903. Quoted in Procter and Gamble v. Teva Pharmaceutical, 566 F.3d 989 (Fed. Cir. 2009).

#### 35 USC § 103(a)

The examiner's rejection of claims 1, 3-6, 9, 11-14 and 16 under 35 U.S.C. 103(a) as being unpatentable over Farrell, et al., (US 6,063,390), issued May 16, 2000, as evidenced by ChemBrief (Optigel SH Synthetic Silicate, June 2003, Vol. 3, Iss. 2) should be reversed.

In addition to the comments concerning the lack of a proper prima facie case under 35 U.S.C. §§ 102(b) above, applicants respectfully submit that Farrell, et al., teaches that the blend must be an anhydrous dry powder ostensibly to avoid any premature reaction prior to the user applying the later wetted wiping article to the skin (col. 1, lines 40-41). Farrell teaches that the desired result of the rapid effervescence created by the intimate dry blend being contacted with water is the production of "copious" lather (col. 1, lines 57-58). Applicants respectfully submit that even if the POSITA would have been motivated to reduce the intimate contact of the dry powder in Farrell, et al., by suspending such powder in an inert medium (i.e. a "substantially anhydrous carrier" claimed in 1(b)), which applicants do not concede, a proper prima facie case under § 103(a) is not made out.



The examiner's rejection of claim 15 under 35 U.S.C. 103(a) as being unpatentable over Farrell, et al., (US 6,063,390), issued May 16, 2000, as evidenced by ChemBrief (Optigel SH Synthetic Silicate, June 2003, Vol. 3, Iss. 2) as applied to claims 1, 3-6, 9, 11-14 and 16 above, and further in view of Sun, et al. (US 2004/0062735) published April 1, 2004, should be reversed.

The examiner asserts that Sun, et al., teach a dry article comprising an insoluble substrate, at least one oxidizing agent and at least one reducing agent, wherein the suitable oxidizing agents include alkaline metal salts and the reducing agents include sulfides and sulfites (column 4, line 40 – column 5, line 22).

Sun relates to a composition or article containing at least one oxidizing agent and at least one reducing agent, wherein at least one of the at least one reducing agent is a depilatory agent, the equivalent ratio of the at least one oxidizing agent to the at least one reducing agent is less than 1:1, and the article is exothermic when wet with water, and the use thereof to remove hair from the skin (see abstract).

Applicants respectfully submit that Sun, et al., fails to remedy the deficiencies of Farrell, et al., and ChemBrief with regards to claim 15 which depends from claim 1.

In conclusion, applications have discovered a skin care or cleansing composition with specific characteristics as presently claimed that unexpectedly gave a unique cleansing, skin benefit, sensory signal or a combination to the user while solving the problems of providing a concentrated cleansing or skin benefit component in a convenient liquid form compared to comparative cases as discussed above.

### VIII. CLAIMS APPENDIX

1. A skin care or cleansing composition, comprising:
  - (a) a dispersed phase including a first component, and a second component that is different from the first, the first component being capable of chemically reacting with the second component;
  - (b) a continuous phase present in the composition composed of a substantially anhydrous carrier;
  - (c) an organophilic particle stabilizer contained in the dispersed phase;
  - (d) wherein the first component is substantially unsolvated in the carrier;
  - (e) an anionic surfactant in a concentration of at least 2% by wt. when the organophilic particle stabilizer consists solely of waxy particles; and
  - (f) wherein the first and second components do not substantially react with water or each other until dispersed or dissolved in water during cleansing or skin treatment by a user.
2. (cancel)
3. The composition of claim 1 wherein the reaction of the first component with the second component is not polymerization.
4. The composition of claim 1 wherein the at least one reactive component has a particle size range of about 0.5 to 5000  $\mu$ .
5. The composition of claim 1 wherein the organophilic particle is in the particle size range of about 0.02 to 250  $\mu$ .
6. The composition of claim 5 wherein the organophilic particle is selected from a waxy particle, organophilic silica, organophilic clay, or blends thereof.
7. (cancel)
8. (cancel)

9. The composition of claim 1 wherein the carrier may contain components that are polar, nonpolar or a blend thereof.
10. (cancel)
11. The composition of claim 1 further comprising dispersed surfactants that are substantially unsolvated by the carrier.
12. The composition of claim 1 further comprising structuring agents that form lamellar, hexagonal, or cubic surfactant phases upon contact with water at 25 C.
13. The composition of claim 1 wherein the first component is capable of producing a gas in aqueous solution when reacted with an acid and the second component is an acid or forms an acid in the presence of water.
14. The composition of claim 1 wherein the first component is capable of generating a peroxide compound when dissolved in water.
15. The composition of claim 1 wherein the first component is capable of generating sulfide ions when reacted with an alkaline material and water.
16. The composition of claim 1 wherein the carrier contains an oil, an emulsifier and wherein the stabilizer is an organophilic clay; and the composition contains a total of at least about 10% of reactive dispersed solids by wt.
17. (cancel)
18. (withdrawn) A solidifiable skin care or cleansing composition, comprising:
- (a) a first component dispersed in a matrix capable of solidification at 25 °C, the component being capable of chemically reacting with a second component that is different from the first component and which is optionally present in the matrix;
  - (b) wherein the first component, the second component or both components are substantially unsolvated in said matrix; and

- (c) wherein said matrix is water soluble or dispersible and contains at least one stabilizer selected from an organophilic particle, an amphipathic compound or polymer, or a crystalline hydroxyl containing stabilizer; and
  - (d) an anionic surfactant in a concentration of at least 2% by wt. when the at least one stabilizer consists solely of waxy particles, amphipathic compounds or polymers, or a combination thereof.
19. (withdrawn) The composition of claim 18 where the composition is a solid at 25 C.
20. (withdrawn) The composition of claim 18 wherein the second component is substantially unsolvated in the matrix.
21. (withdrawn) The composition of claim 18 wherein the reaction of the first component with water or the first component and the second component is not polymerization.
22. (withdrawn) The composition of claim 18 wherein the matrix may contain components that are polar, nonpolar or a blend thereof.
23. (withdrawn) The composition of claim 18 wherein the first and second components do not substantially react with each other until dispersed or dissolved in water.
24. (withdrawn) The composition of claim 18 further comprising at least one surfactant that is substantially unsolvated by the matrix.
25. (withdrawn) The composition of claim 18 further comprising structuring agents that form lamellar, hexagonal, or cubic surfactant phases upon contact with water at 25 C.
26. (withdrawn) The composition of claim 18 wherein the first component is capable of producing a gas in aqueous solution when reacted with an acid and the second component forms an acid in the presence of water.
27. (withdrawn) The composition of claim 18 wherein the first component is capable of generating sulfide ions when reacted with an alkaline material and water.

28. (withdrawn) The composition of claim 18 wherein the composition contains a solidified oil or wax, and an emulsifier.

29. (withdrawn) The composition of claim 18 wherein the composition contains a total of at least about 10% of one or more substantially anhydrous reactive materials selected from ammonium, amine, alkali and alkaline metal salts of carbonates, bicarbonates, organic acids, organic anhydrides, inorganic or organometallic acids, acid precursors and blends thereof.

30. (withdrawn) The composition of claim 18 where the first component is a solid or semisolid containing dissolved carbon dioxide.

31. (withdrawn) A toilet bar, comprising:

- (a) a solid base containing a soap, a non-soap anionic surfactant, or a combination thereof in a total concentration greater than about 10 % by wt.;
- (b) a dispersed phase composed of a first component, the first component being capable of chemically reacting with a second component that is different from the first;
- (c) a continuous phase present in the composition composed of a substantially anhydrous carrier;
- (d) a stabilizer contained in the dispersed phase; wherein the first component is substantially unsolvated in the carrier;
- (e) wherein the dispersed and continuous phase separately form one or more domains of at least 1 mm average length along its major axis in the solid base; and
- (f) wherein the second component is contained in the solid base.

32. (withdrawn) A toilet bar, comprising:

- (a) a solid base containing a soap, a non-soap anionic surfactant, or a combination thereof in a total concentration greater than about 10 % by wt.;
- (b) a first dispersed phase composed of a first component, the first component being capable of chemically reacting with a second component that is different from the first;
- (c) a second dispersed phase containing the second component;

- (d) a first continuous phase present in the composition composed of a first substantially anhydrous carrier;
- (e) a second continuous phase present in the composition composed of a second substantially anhydrous carrier;
- (f) a stabilizer contained in each of the first and second dispersed phases; wherein the first component is substantially unsolvated in the first carrier and the second component is substantially unsolvated in the second carrier; and
- (g) wherein each of the first and second carriers form one or more separate domains of at least 1 mm average length along their major axis.

33. (withdrawn) A method of treating the skin or hair, comprising the steps of:

- (a) contacting the skin or hair with a composition containing
  - (1) a dispersed phase composed of a first component capable of chemically reacting with a second component that is different from the first and which is optionally present in the dispersed phase;
  - (2) a continuous phase composed of a substantially anhydrous carrier;
  - (3) at least one stabilizer selected from an organophilic particle, an amphipathic compound or polymer, or a crystalline hydroxyl containing stabilizer;
  - (4) wherein the first component, the second component or both components are substantially unsolvated in the carrier;
  - (5) an anionic surfactant in a concentration of at least 2% by wt. when the at least one stabilizer consists solely of waxy particles, amphipathic compounds or polymers, or a combination thereof; and
- (b) adding water to the composition on the skin or hair.

34. (withdrawn) The method of claim 33 where the second component is the same as or is different from water.

35. (withdrawn) The method of claim 33 where the second component contains less than about 50% by wt. of water and where the second component is added to the first component before or after contacting the skin or hair with the first component.

36. (withdrawn) A method of treating the skin or hair, comprising the steps of:

(a) contacting the skin or hair with a solidifiable composition containing

- (1) a first component dispersed in a matrix capable of solidification at 25 °C, said component being capable of chemically reacting with a second component that is different from said first component and which is optionally present in the matrix;
- (2) wherein the first component, the second component or both components are substantially unsolvated in said matrix;
- (3) wherein said matrix is water soluble or dispersible and contains at least one stabilizer selected from an organophilic particle, an amphipathic compound or polymer, or a crystalline hydroxyl containing stabilizer ;
- (4) an anionic surfactant in a concentration of at least 2% by wt. when the at least one stabilizer consists solely of waxy particles, amphipathic compounds or polymers, or a combination thereof.

(b) adding water to the solidified composition on the skin or hair.

37. (withdrawn) The method of claim 35 wherein the composition is a solid at 25 C.

38. (withdrawn) The method of claim 35 where the second component is the same as or is different from water.

39. (withdrawn) The method of claim 35 where the second component contains less than about 50 % by wt. of water and where the second component is added to the first component before or after contacting the skin or hair with the first component.

IX. EVIDENCE APPENDIX

The following definitions "continuous phase" McGraw Hill Dictionary, 5th Edition, McGraw Hill, Inc., "organophilic" and "organophilicity" Medilexicon.com downloaded July 20, 2010, have been entered in the case and are relied on by appellant.

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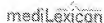
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**organophilic****Type:** Term**Pronunciation:** Or-ga-nô-fik**Definitions:**

1. Pertaining to organophilicity.

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**organophilicity****Type:** Term**Pronunciation:** ɔːrɡə-nə-fil-ə-tē**Definitions:**

1. Attraction of nonpolar substances (organic molecules) to each other.

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7/26/2010

No evidence pursuant to 37 C.F.R. §§ 1.130, 1.131 or 1.132 or any other evidence has been entered by the examiner and relied upon by the appellant in this appeal.

#### **X. RELATED PROCEEDINGS APPENDIX**

Applicants note that a Decision on Appeal and a Decision on Request for Reconsideration recently issued in copending application serial no. 10/730,709, which was previously submitted in an IDS on June 20, 2005, and is of record in the case.

No other decisions have been rendered by a court or the Board in any other proceeding related to this appeal.

#### **XI. TABLE OF AUTHORITIES**

KSR v. Teleflex, 127 S. Ct. 1727 (2007)

In re O'Farrell, 853 F.2d 894, 903 (Fed. Cir. 1988)

In re Kubin, 561 F.3d 1351 (Fed. Cir. 2009)

Procter and Gamble v. Teva Pharmaceutical, 566 F.3d 989, (Fed. Cir. 2009)

In re Am. Acad. Of Sci. Tech. Ctr., 367 F.3d 1359, 1364 (Fed. Cir. 2004)

### CONCLUSION

In view of the above, Appellants respectfully submit that proper objections and rejections under 35 U.S.C. §§ 102(b) and 103(a) have not been made. Accordingly, reversal of the Final Rejection by the Honorable Board is appropriate and is courteously solicited.

Respectfully submitted,

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